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No. 91-205

In The

Supreme Court of the United States

October Term, 1991

STONEWALL UNION and CRAIG COVEY,

Petitioners,

vs.

CITY OF COLUMBUS, LARRY H. JAMES, and JAMES G. JACKSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

PROCEDURAL HISTORY

On May 16, 1985 the Petitioners filed a complaint under 42 U.S.C. Section 1983 requesting the United States District Court for the Southern District of Ohio to declare Sections 2111.02, 2111.04 and 2111.05(d) of the Columbus City Codes unconstitutional on their face and as applied. (A copy of the ordinance is contained in Petitioners' Appendix.) These sections provide that in order to conduct a parade upon the streets of Columbus a person must pay a parade permit application fee and the costs for traffic control along the parade route.

On May 30, 1985 Petitioners filed a motion for a preliminary injunction requesting the District Court to compel the City of Columbus to issue Petitioners a parade permit without requiring them to pay the application fee and traffic control costs. On June 20, 1985 the District Court issued a written order and memorandum denying Petitioners' motion.

On June 21, 1985 Petitioners requested the District Court to grant an injunction pending an appeal of the previous order. On June 25, 1985 the District Court denied Petitioners' request.

On May 24, 1986 the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment and on June 10, 1986 the Court of Appeals denied a motion for an injunction pending final disposition of the appeal.

On June 17, 1986 Justice O'Connor of this Court denied Petitioners' application for a stay. On July 14, 1986

the Court of Appeals denied Petitioners' request for a rehearing en banc.

On June 28, 1990 the District Court granted Respondents' motion for summary judgment on the constitutional validity of the ordinance and its application. On May 6, 1991 the Court of Appeals affirmed the District Court's decision that the ordinance was constitutional on its face. The Court of Appeals reversed the District Court's decision to grant summary judgment on the issue of discriminatory application. The Court of Appeals remanded the case for a hearing regarding the allegations of discriminatory application.

FACTUAL BACKGROUND

On June 30, 1985 the Petitioners conducted a parade upon the streets of downtown Columbus after paying the standard parade permit application fee of $85.00 and police traffic control costs of $672.00. The parade consisted of approximately 3,000 people.

The permit application fee was determined following a cost study analysis conducted by an outside consultant using standard cost accounting principles. The fee is actually less than the $92.25 determined in the cost study analysis.

The traffic control costs were determined by a police lieutenant in the Traffic Bureau of the Columbus Police Department. The lieutenant considered the following factors in determining the traffic control costs:

(1) The proposed route and the designated route for the parade.

(2) The time of day that the event is to take place.

(3) The date and day of the week proposed.

(4) The general traffic conditions in the area requested, both vehicular and pedestrian. Special attention is given to the rerouting of the vehicles or pedestrians normally using the requested area.

(5) The number of marked and unmarked intersections along the route requested, together with the traffic control devices present.

(6) If traffic must be completely rerouted from the area, then the number of marked and unmarked intersections and the traffic control devices are taken into consideration.

(7) The estimated number of participants.

(8) The estimated number of viewers.

(9) The nature, composition, format, and configuration of the parade or run.

(10) The anticipated weather conditions.

(11) The estimated time for the parade, run, or event.

After applying the above factors, it was determined that fifteen police officers, one sergeant, one lieutenant and four police vehicles would be needed to control traffic for Petitioners' parade. The costs for the police personnel amounted to $640.50 based upon the standard special duty rate for police officers. This rate is less than the overtime rate for police officers. The total costs for the four police vehicles for two hours was $32.00.

Petitioner Craig Covey testified that the Stonewall Union had approximately $3,000.00 in its treasury at the time of the parade. Covey further indicated that they expected to receive donations of a dollar or more from the parade participants.

In 1986 Petitioners paid an $85.00 permit fee and traffic control costs of $645.00 for a parade consisting of 3,000 to 5,000 participants. In 1987 Petitioners paid an $85.00 permit fee and traffic control costs of $799.50 for a parade consisting of 7,500 participants. The record contains no evidence regarding the Petitioners' parades held in 1988, 1989, 1990 or 1991.

Respondents strongly disagree with Petitioners' statements of fact regarding the alleged discriminatory application of the parade ordinance. However, the issue of discriminatory application is not ripe for this Court's determination. The Court of Appeals has remanded this case to the District Court for an evidentiary hearing on the issue. Therefore, Respondents will not at this time present any facts regarding the uniform application of the parade ordinance.

SUMMARY OF THE ARGUMENT

This case involves the determination of whether the Columbus, Ohio, parade ordinance violates the First Amendment of the United States Constitution. The Sixth Circuit Court of Appeals, applying the standards set forth in *Cox v. New Hampshire*, 312 U.S. 569 (1941) and *United States v. Grace*, 461 U.S. 171 (1983), has determined that the ordinance is constitutional. This case does not involve any new issues of federal law. The case simply involves the application of well-established constitutional standards to a particular city ordinance.

ARGUMENT

A MUNICIPAL ORDINANCE WHICH IMPOSES PERMIT APPLICATION FEES AND TRAFFIC CONTROL COSTS FOR PARADES HELD ON THE PUBLIC STREETS DOES NOT VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The issue in this case is whether the Columbus parade ordinance, Chapter 2111 of the Columbus City Codes, violates the First Amendment of the United States Constitution. More specifically, the issue is whether the provisions requiring prepayment of an $85.00 parade permit application fee and $672.00 in traffic control costs violated Petitioners' First Amendment rights.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), this Court upheld the constitutionality of regulations governing the use of public streets for parades. This Court in rejecting a similar First Amendment challenge stated as follows:

> The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of the public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some

> civil rights which in other circumstances would be entitled to protection.

Id. at 574.

The parade statute in *Cox* required payment of a license fee prior to marching in the streets. The fee could range from a nominal amount to $300.00. The New Hampshire Supreme Court held that the license fee was designed "to meet the expense incident to the administration of the Act and to the maintenance of public order." This Court in upholding the license fee requirement stated as follows:

> There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustments of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

Id. at 577.

This case is a self-fulfilling prophecy made by Petitioners' counsel in a law review article entitled *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?* 62 Tex. L. Rev. 403 (1983). In that article, Petitioners' counsel stated that this Court would "be asked to reconsider the question of the constitutionality of pecuniary requirements." *Id.* at 405.

The Sixth Circuit Court of Appeals relied upon the *Cox* case in upholding the Columbus parade ordinance.

To this date, this Court has not deviated from the standards set down in the *Cox* ruling. However, Petitioners argue that this Court narrowed the *Cox* holding in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

In *Murdock* this Court struck down a license tax imposed on persons canvassing or soliciting. This Court noted that the license fee was a flat fee, was "unrelated to the scope of the activities" and was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 113, 114.

Petitioners contend that the Constitution only permits the imposition of *nominal* charges for permits and police services. However, *Murdock* did not impose a nominal amount limitation. *Murdock* simply applied the *Cox* standards to a different license ordinance. As the Court of Appeals noted, the parade fees in the present case

> resemble the costs imposed in *Cox* and are not designed to extract a tax on those who choose to exercise their First Amendment rights as was the case in *Murdock*.

Stonewall Union v. Columbus, 931 F.2d 1130, 1133 (6th Cir. 1991).

Interestingly, Petitioners do not attempt to define what constitutes a "nominal" fee. Based upon the consumer price index contained in the Economic Report of the President transmitted to the Congress in February 1986, the $300.00 fee approved by this Court in *Cox* would equal a fee in excess of $2,000.00 in 1985 dollars.

The fees imposed for the 1985 parade amounted to approximately twenty-five cents per participant. The fees

for the 1987 parade were less than fifteen cents per participant. Although the Constitution does not limit fees for police services to nominal amounts, the fees in this case were indeed "nominal." More importantly, the fee reasonably reflects the actual cost of processing the permit and providing traffic control.

It is not unreasonable to expect parade participants to pay twenty-five cents to cover traffic control costs for their exclusive use of the streets. On any given Saturday in the United States, thousands of runners pay ten to twenty dollars to run in local road races. Furthermore, Petitioners admitted in 1985 that they intended to solicit donations of at least "a couple dollars" from parade participants.

In *United States v. Grace*, 461 U.S. 171 (1983) this Court reaffirmed the government's right to enforce

> reasonable time, place, and manner regulations as long as the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Id. at 177.

As the Court of Appeals determined, the Columbus parade ordinance meets the standards set forth by this Court in *Grace*. The ordinance is content-neutral and serves a significant government interest in protecting the public in the use of the streets. The ordinance leaves open ample alternative channels of communication, including the free use of the sidewalks along the same parade route, and the free use of Columbus parks for assemblies.

Petitioners' contention that the Columbus parade ordinance grants unbridled discretion in the determination of traffic control costs is unsupported by the record. The ordinance sets forth specific factors to be considered in imposing the traffic control costs. As stated earlier, the police lieutenant who determines the amount of the fee considers the following factors:

> (1) The proposed route and the designated route for the parade.
>
> (2) The time of day that the event is to take place.
>
> (3) The date and day of the week proposed.
>
> (4) The general traffic conditions in the area requested, both vehicular and pedestrian. Special attention is given to the rerouting of the vehicles or pedestrians normally using the requested area.
>
> (5) The number of marked and unmarked intersections along the route requested, together with the traffic control devices present.
>
> (6) If traffic must be completely rerouted from the area, then the number of marked and unmarked intersections and the traffic control devices are taken into consideration.
>
> (7) The estimated number of participants.
>
> (8) The estimated number of viewers.
>
> (9) The nature, composition, format, and configuration of the parade or run.
>
> (10) The anticipated weather conditions.
>
> (11) The estimated time for the parade, run, or event.

As the Court of Appeals determined, these factors provide "objective and definitive standards" and "prevent unfettered discretion." 931 F.2d at 1135. Unlike the police protection fee struck down in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), the Columbus ordinance does not consider the controversial nature of the parade in determining the traffic control costs.

The Columbus parade ordinance does not take into consideration any expenses for additional police protection for the safety of the speech participants. This service is provided at no cost to the demonstrators. The assessment of this police protection fee in the Orlando ordinance was the primary reason for the Eleventh Circuit Court of Appeals' determination that the ordinance was not applied in a content-neutral manner. 774 F.2d at 1517.

The Columbus ordinance also differs from the Orlando ordinance in providing meaningful alternative channels of communication. Parade organizers who are unwilling or unable to pay the traffic control costs may use the Columbus sidewalks and parks free of charge. A sidewalk parade or procession reaches the exact same audience as a street parade.

The record indicates that on May 18, 1985 approximately 5,000 members of the Boy Scouts of America celebrated their Diamond Jubilee by parading on the sidewalks of Columbus. On May 8, 1987 a "Take Back the Night" parade was also conducted upon the sidewalks of Columbus. Neither sidewalk parade was required to pay permit fees or traffic control costs.

The Columbus parade ordinance, unlike the Orlando ordinance, is not unconstitutional. The Columbus ordinance is content-neutral and provides alternative channels of communication. The $85.00 application fee and $672.00 in traffic control costs did not violate Petitioners' First Amendment rights.

CONCLUSION

The Sixth Circuit Court of Appeals, applying the well-established standards set forth in *Cox v. New Hampshire*, 312 U.S. 569 (1941) and *United States v. Grace*, 461 U.S. 171 (1983), correctly determined that the Columbus parade ordinance is constitutional.

The fees paid by Petitioners reasonably reflect the actual costs of processing the parade permit application and providing traffic control. "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated." *Cox, supra* at 577.

Based upon the foregoing reasons, Respondents respectfully urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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